No. 06-2355

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL F. WEINBAUM, *et al.*,
Plaintiffs-Appellants,

v.

CITY OF LAS CRUCES, ***et al.*,**
Defendants-Appellees.

ON APPEAL FROM THE DISTRICT OF NEW MEXICO

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Defendants-Appellees
Supporting affirmance

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on religious liberty and the interpretation of the Establishment Clause.

This brief is filed pursuant to consent from Counsel of Record for the Appellee and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

ARGUMENT

I. THIS CASE SHOULD BE DISMISSED FOR LACK OF JURISDICTION BECAUSE ESTABLISHMENT CLAUSE CLAIMS ARE NOT PROPERLY BROUGHT UNDER 42 U.S.C. § 1983.

This lawsuit was brought pursuant to 42 U.S.C. § 1983 (2006). Because § 1983 (and its jurisdictional counter part 28 U.S.C. §1343(3) (2006))[1] does not give the federal courts jurisdiction in Establishment Clause cases, this case should be dismissed for lack of subject matter jurisdiction. Both the district court, *Weinbaum v. City of Las Cruces*, 465 F. Supp. 2d 1164, 1165 (D.N.M. 2006), and the Appellant, Brief of Appellant, *vi, claim that jurisdiction for this case arises under 28 U.S.C. § 1331 (2006) because the court is entertaining a § 1983 claim. While

[1] The United States Supreme Court explained the relationship between § 1983 and §1343(3) in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 543 n.7 (1972). However, because some Supreme Court cases speak of jurisdiction under § 1983, this brief will follow suit and use this shorthand.

§ 1331 confers jurisdiction to hear an Establishment Clause claim, it does not confer jurisdiction to a § 1983 claim, which leads to attorney fees under 42 U.S.C. § 1988 (2006). That is an important distinction for this Court to make. Plaintiffs can sue directly under the Establishment Clause instead of under § 1983; the plaintiff should not benefit from the "blackmail scheme" by threatening state defendants with the prospect of being forced to pay enormous attorney fee awards. See generally, Steven W. Fitschen, *From Black Males to Blackmail: How the Civil Rights Attorney's Fees Award Act of 1976 (42 USC § 1988) Has Perverted One of America's Most Historic Civil Rights Statutes* (forthcoming) for a discussion of how strict separationists and others use § 1983 and § 1988 to "blackmail" states and localities into not defending Establishment Clause cases.[2] Therefore, this Court should either dismiss the case for lack of subject matter jurisdiction if it is to be treated as a § 1983 claim, or in the alternative, this case should arise solely as an Establishment Clause claim under §1331.

At first blush, this assertion may seem counterintuitive since plaintiffs have developed the habit of using § 1983 as a vehicle for Establishment Clause claims. However, Congress never intended this result. The legislative history of § 1983 confirms that its drafters did not intend for it to encompass Establishment Clause claims. Section 1983 was originally § 1 of the Ku Klux Act of 1871. Although § 1

[2] A Working draft of this article is available at http://www.nlf.net/articles/blackmail.pdf.

received limited debate, *see, e.g., Monell v. Department of Social Services*, 436 U.S. 658, 665 (1978), the meaning of "rights, privileges and immunities" which § 1983 was enacted to protect can be determined by examining the debate over the entire act.

As introduced, the Act was entitled "A Bill to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes." *Cong. Globe*, 42 Cong., 1st Sess. 597 (1871). After the Bill was introduced, Representative Stoughton (R-Michigan) spoke to demonstrate the need for the Act:

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy. Full force and effect is therefore given to § five [of the Fourteenth Amendment], which declares that "Congress shall have power to enforce by appropriate legislation the provisions of this article."

Id. at 606.

With this context, it is readily understandable that the most common view of "rights, privileges, and immunities" was one that equated it with life, liberty, and property. *See, e.g.*, *Cong. Globe*, 42 Cong., 1st Sess. 615 (1871). Several Congressmen gave extended comments with similar illustrative examples of the concerns that animated the Act's passage. *None raised any Establishment Clause*

concerns. The Establishment Clause was simply not in view.

At the time of the passage of The Civil Rights Attorney's Fee Awards Act of 1976 (§ 1988), very few Establishment Clause cases were brought under § 1983. However, in the thirty years following § 1988's enactment, a significant number of cases have brought pursuant to § 1983. Justice Powell suggested the reason in his dissent in *Maine v. Thiboutot,* 448 U.S. 1, 24 (1980)[3]: "There is some evidence that § 1983 claims are already being appended to complaints solely for the purpose of obtaining fees in actions where 'civil rights' of any kind are at best an afterthought. . . . [I]ngenious pleaders may find ways to recover attorney's fees in almost any suit against a state defendant."

Indeed, the Ninth Circuit Court of Appeals has questioned the appropriateness of bringing Establishment Clause claims under § 1983. *Cammack v. Waihee*, 932 F.2d 765 (9th Cir. 1991). "Because the parties have not briefed the point, we express no opinion on the efficacy of bringing an establishment clause challenge under § 1983. We note that this route has been traveled before without exciting controversy (or even comment)." *Id*. at 768 n.3 (citations omitted) (noting only two cases that had reached the Supreme Court (explicitly) under § 1983—the number has not significantly increased since). Since *Cammack*, additional cases, such as *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000), have

[3] The context of his remarks was different than that being addressed, however, the concern is transferable.

reached the Supreme Court in a similar posture, *i.e.*, an Establishment Clause claim had been brought under § 1983 without the Court acknowledging that fact. However, only two cases, besides *Marsh v. Chambers*, 463 U.S. 783 (1983) (simply noting that the Establishment Clause challenge was brought under § 1983), have been brought under § 1983 in which the Court has both acknowledged that fact and decided the claim on the merits. *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v.Perry*, 545 U.S. 677 (2005).

Significantly, the Supreme Court specifically noted that the "'Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us.'" *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989) (*quoting Hagans v. Lavine,* 415 U.S. 528, 535, n.5 (1974) (brackets in original)). Accordingly, this Court should follow the lead of the *Cammack* court and recognize that § 1983 does not give the federal courts jurisdiction over Establishment Clause claims and dismiss the case for want of jurisdiction.[4]

[4] This Court noted that it will address issues raised solely by *amici* if they raise jurisdictional, federalism, or comity issues. *Wyoming Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000). This is also the policy of the United States Supreme Court. *Davis v. United States*, 512 U.S. 452, 457, n.* (1994); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality opinion). *Amicus* argues that this Court and the district court lack subject matter jurisdiction. As this Court has held, "Federal courts 'have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,' and thus a court may sua sponte raise the question of whether there is

II. THE CITY SEAL SHOULD BE EVALUATED AND UPHELD UNDER *MARSH V. CHAMBERS* BECAUSE IT FALLS WITHIN TWO PRACTICES THAT ARE "DEEPLY-ROOTED IN OUR HISTORY AND TRADITION."

Should this Court disagree that it lacks jurisdiction, *Amicus* urges this Court to affirm the District Court's decision. While the court below was correct in its analysis of the city seal under the various tests it employed, it also could have relied on the test articulated in *Marsh*, 463 U.S. at 783, an equally binding precedent. The *Marsh* test asks whether the long-standing practice at issue, "based upon the historical acceptance[,] . . . [has] become 'part of the fabric of our society.'" *Wallace v. Jaffree*, 472 U.S. 38, 63 n. 4 (1985) (Powell, J., concurring) (citation omitted).

Indeed, in its recent Ten Commandments case, *Van Orden v. Perry*, 545 U.S. 677 (2005) (one of the cases relied upon by the court below), the plurality specifically refered to *Marsh* as an example of how the recognition of the role of God in our nation's heritage is permissible under the Establishment Clause. Writing for the plurality, Chief Justice Rehnquist noted that the constitutional analysis of the monument in *Van Orden* "is driven both by the nature of the monument and by our Nation's history," not the *Lemon* test. *Id*. at 686. He went

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subject matter jurisdiction 'at any stage in the litigation.'" *1Mage Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir. 2006) (quoting *Arbaugh v. Y & H. Corp.*, 126 S.Ct. 1235, 1244 (2006). While the *Cammack* court did not decide the issue because the parties did not raise it, 932 F.2d at 768, we hereby directly raise this issue before this Court.

on to say that "'[t]here is an unbroken history of official acknowledgement by all three branches of government of the role of religion in American life from at least 1789.'" *Van Orden*, 545 U.S. at 866 (*quoting Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)).

Rehnquist continued with a *Marsh*-like analysis, noting the deeply embedded practice of recognizing the role God in our Nation's heritage:

> Recognition of the role of God in our Nation's heritage has also been reflected in our decisions. We have acknowledged, for example, that "religion has been closely identified with our history and government," *School Dist. of Abington Township v. Schempp*, and that "the history of man is inseparable from the history of religion," *Engel v. Vitale*. This recognition has led us to hold that the *Establishment Clause* permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the State. *Marsh v. Chambers*. Such a practice, we thought, was "deeply embedded in the history and tradition of this country."

Van Orden, 545 U.S. at 687-88 (footnote and citations omitted).

Rehnquist compared the monument outside the Texas State Capitol with other examples of Ten Commandments displays on government property, describing them as "acknowledgements of the role played by the Ten Commandments in our Nation's heritage," *id*. at 688, and not unconstitutional establishments of religion. Thus, by rejecting the *Lemon* test and relying on the same analysis found in *Marsh*, the *Van Orden* plurality evaluated the Texas Ten Commandments display from a *Marsh* perspective.

This is consistent with the view of pre-*Van Orden* courts which had begun to

realize that even when a practice fails the *Lemon* test it could be upheld if it passed the *Marsh* test. For example, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order at 10 (N.D. Ind. Mar. 19, 2004), the district court stated, "a practice that fails the *Lemon* test 'may still be found constitutional under the *Marsh* exception to the *Lemon* test.'" *Id*. (quoting *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002)).[5]

Furthermore, Justice Breyer's concurrence in *Van Orden* also recognized the relevance of the *Marsh* analysis and found the *Lemon* test an unsatisfactory substitute for the exercise of legal judgment in these cases. *Van Orden*, 545 U.S. at 699-700. Breyer distinguished *Van Orden* from *McCreary County*–the other Ten Commandments case decided the same day–by noting that the *Van Orden* display is "simply an effort primarily to reflect, historically, the secular impact of a religiously inspired text." *Van Orden*, 545 U.S. at 703. This historical reflection is exactly what the *Marsh* court found constitutionally acceptable.

Therefore, while it was proper to use the modified *Lemon* test, as tempered by *Van Orden* and *McCreary* in its Establishment Clause analysis, *Weinbaum,* 465 F.Supp. 2d at 1177, the court below could also have decided the case under *Marsh*. *Van Orden*, then, does not present an obstacle to this argument since the two

[5] It is true that some courts that have acknowledged *Marsh* as an exception have gone on to mis-apply it. However, this Brief will explain how the instant monument should be upheld under a *proper* application of *Marsh*.

approaches are completely compatible. By emphasizing *Marsh* this brief adds an additional vantage point on the constitutionality of the instant city seal.

Just as *Van Orden* does not present an obstacle to deciding the case under *Marsh*, neither does the holding of *McCreary County* create a barrier. There, copies of the Ten Commandments were hung in the courthouse pursuant to an order from the county legislature. 545 U.S. at 851. In finding the display unconstitutional, the Court held that "the counties' manifest objective may be dispositive of the constitutional enquiry, and that the development of the presentation should be considered when determining its purpose." *Id*. The Court failed to find a valid secular purpose or objective in the County's display. *Id.* at 881.

But such is not the case here. The district court found that the city advanced three valid and constitutional secular purposes. *Weinbaum,* 465 F. Supp. 2d at 1179 ("identifying city activities and property; promoting the City's unique history; and linking the City to its origin"). Since the purpose here is distinguishable from that in *McCreary County*, the district court was correct to uphold the seal's constitutionality. However, to repeat, this Brief will show why the monument is constitutional under *Marsh.*

We note that some courts have incorrectly tried to limit *Marsh* to chaplaincy cases. *See, e.g., Graham v. Cent. Cmty. Sch. Dist,* 608 F. Supp. 531, 535 (S.D.

Iowa 1985). However, that has not been the Supreme Court's approach. Indeed, that Court has not even limited *Marsh* to Establishment Clause cases. *See, e.g., Printz v. United States*, 521 U.S. 898, 905 (1997) (evaluating history of federal use of state executives in law enforcement).

Lower courts have also applied *Marsh's* historical analysis in a variety of case settings. *See, e.g., Michel v. Anderson*, 14 F.3d 623, 631 (D.C. Cir. 1994) (affirming rights of delegates to vote in House of Representatives Committee of the Whole); *Dornan v. Sanchez,* 978 F. Supp. 1315, 1319 (C.D. Cal. 1997) (upholding discovery subpoena rule under Federal Contested Elections Act); *Nat'l Wildlife Fed'n v. Watt*, 571 F. Supp. 1145, 1157 (D.D.C. 1983) (enjoining leasing federal lands for coal mining); *James v. Watt*, 716 F.2d 71, 76 (1st Cir. 1983) (evaluating Indian Commerce Clause).

Further, where *Marsh* has been applied in the Establishment Clause context, it has not been limited to legislative prayer cases. Most importantly, courts have applied *Marsh* in religious display cases. *See e.g., ACLU v. Wilkinson*, 701 F. Supp. 1296 (E.D. Ky. 1988); *State v. Freedom from Religion Foundation*, 898 P.2d 1013, 1029, 1043 (Colo. 1996); *Conrad v. Denver*, 724 P.2d 1309, 1314 (Colo. 1986). Courts have also used *Marsh* to analyze prayer at other deliberative bodies, *e.g., Bacus v. Palo Verde Unified School District Board of Education*, 11 F. Supp. 2d 1192, 1196 (C.D. Cal. 1998); the prayer room at the Illinois statehouse, *Van*

Zandt v. Thompson, 839 F.2d 1215 (7th Cir. 1988); public proclamations with "religious" content, *Allen v. Consol. City of Jacksonville*, 719 F. Supp. 1532, 1538 (M.D. Fla. 1989); the dating of government documents with "A.D.", *benMiriam v. Office of Pers. Mgmt.*, 647 F. Supp. 84, 86 (M.D.N.C. 1986); religious expression in the form of an invocation and benediction at a public university graduation ceremony, *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997); and the Pledge of Allegiance in a public school, *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

Of course, the most significant consideration here is that the Supreme Court has never overturned *Marsh*, either explicitly or *sub silentio*. The Court could have done just that in *Lee v. Weisman*, 505 U.S. 577 (1992), but instead chose merely to distinguish that case.

In *Weisman*, the Court noted *Marsh's* on-going viability and explained why it would not apply *Marsh.* 505 U.S. at 596. The Court did not overturn, criticize, or even question *Marsh*; nor did it characterize *Marsh* as anomalous. The Court merely stated that "[i]nherent differences between the public school system and a session of a state legislature distinguish[ed] [*Weisman*] from *Marsh v. Chamber*s." *Id*. (citation omitted). The Court then noted that, while the invocation and benediction at issue in *Lee* were similar to the issues considered in *Mars*h, there were obvious differences. *Id*. at 597. Those differences were the age of the people

hearing the prayers, the ability to leave if desired, and the context in which they heard the prayers. *Id*. The Court stated that the "decisions in *Engel v. Vitale* and *School Dist. of Abington v. Schempp* require us to distinguish the *public school context*." *Id.* (citations omitted) (emphasis added). Relying primarily on the age of the school children, the Court found that the "influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* The Court also noted that the "*Marsh* majority in fact gave specific recognition to this distinction and placed particular reliance on it in upholding the prayers at issue there." *Id.*

In the instant case, all of the differences in *Weisman* are absent. At the basic level, this is a *display* case, not a school prayer case. Additionally, significant differences as to context, setting, and audience exist in this case distinguishing it from *Weisman*. Simply put, *Marsh* controls this case.

In *Marsh*, the Supreme Court upheld prayers offered by a publicly funded, Christian clergyman at the opening of the Nebraska legislative sessions. 463 U.S. at 786. The Court declared that prayer before legislative sessions "is deeply rooted in the history and tradition of this country," *id.,* and that it had "become part of the fabric of our society," *id.* at 792. In support of its ruling, the Court emphasized historical evidence from the colonial period through the early Republic. The Court stated that the *actions* of the First Congressmen corroborated their intent that

prayers before legislatures not contravene the Establishment Clause. *Id*. at 790. The Court also emphasized that long-standing traditions should be given great deference. *Id.* at 788.

Some courts have been willing to consider a challenged practice under *Marsh*, but have applied it at an improper level of abstraction. One of the most egregious examples is provided by the district court in *Glassroth v. Moore,* 229 F. Supp. 2d 1290, (M.D. Ala. 2002), the case in which the Ten Commandments monument in the Alabama Judicial Building was challenged. This is best understood by comparing that court's opinion with the opinion of the Sixth Circuit sitting *en banc* in *ACLU v. Capitol Square Review & Advisory Board,* 243 F.3d 289 (6th Cir. 2001), which approved the display of the state motto containing a religious inscription.

In *Capitol Square*, the ACLU sued to enjoin the placement of the Ohio State motto, "With God, All Things Are Possible," in the plaza facing the state Capitol. *Id.* at 292. Rejecting the Establishment Clause claim, the Sixth Circuit relied upon the long-standing constitutionally permissible tradition of official governmental recognition of God. The Sixth Circuit specifically noted the following: President Washington's congressionally-solicited Thanksgiving Proclamation, Congressional chaplains, the reenactment of the Northwest Ordinance, the references in forty-nine state constitutions to God or religion, Thanksgiving Proclamations by presidents

other than Washington, President Lincoln's Gettysburg Address, and the repeated upholding of "In God We Trust" on our currency. *Id*. at 296-301.

Two points stand out about the Sixth Circuit's analysis. First, the *Capitol Square* court took one of *Marsh's* most cited principles and applied it to a display case. Tracing acknowledgements of God back to the First Congress, the Sixth Circuit concluded that the Ohio motto display was constitutional under *Marsh*:

> The actions of the First Congress . . . reveal that its members were not in the least disposed to prevent the national government from acknowledging the existence of Him whom they were pleased to call "Almighty God," or from thanking God for His blessings on this country, or from declaring religion, among other things, "necessary to good government and the happiness of mankind." The drafters of the First Amendment could not reasonably be thought to have intended to prohibit the government from adopting a motto such as Ohio's just because the motto has "God" at its center. If the test which the Supreme Court applied in *Marsh* is to be taken as our guide, then the monument in question clearly passes constitutional muster.

Capitol Square, 243 F.3d at 300.

Second, none of the Sixth Circuit's historical examples even addressed religious displays. Thus, the Sixth Circuit understood that the *Marsh* analysis must be done at the proper level of abstraction.

In comparison, the *Glassroth* court's analysis was conducted at the wrong level of abstraction. It asked whether "members of the Continental Congress displayed the Ten Commandments in their chambers." *Glassroth*, 229 F. Supp. 2d

at 1308.[6] Under this misapplication of the test, the Sixth Circuit should have held the display of the Ohio motto unconstitutional absent evidence that the Continental Congress had displayed it in its chambers. Merely stating this approach highlights its failings.

Similarly, in *Books v. Elkhart County*, No. 3:03-CV-233 RM, mem. order (N.D. Ind. Mar. 19, 2004), the district court held that the tradition of erecting Ten Commandments displays only began in the 1940s; thus, it could not meet the *Marsh* standards of being "woven into the fabric of our society" or constituting "a long unbroken tradition." Here again, the *Capitol Square* court's approach is superior—displays containing religious content are part of a larger tradition that *does* have an adequate historical pedigree. Indeed as will be demonstrated below, these displays are part of *two* important traditions.

A. The City Seal Should be Upheld Because it is Part of a Long-Standing Tradition of Inscribing Religious References on Public Property.

This nation has a long-standing tradition of placing religious sentiments and scriptural references on government property. Examples abound, but the following list illustrates the point:[7]

- In the House of Representatives Chamber, in our nation's Capitol,

[6] Admittedly, *Glassroth* involved other factually unique aspects. Nonetheless, the statements above were given as another reason why the monument violated the Establishment Clause.

[7] Examples are from Catherine Millard, *God's Signature Over the Nation's Capital* (1988).

above and behind the Speaker's Chair is the inscription, "In God We Trust."

- Directly opposite the Speaker's Chair, among a collection of bas-relief profiles of famous lawmakers of history, is the profile of Moses. Of the many which appear, it is the most prominent.

- In the Capitol is a private room dedicated for use by members for prayer and meditation. This room contains a stained glass window, depicting George Washington with his hands clasped together in prayer.

- In the main reading room of the Library of Congress are statues of Moses and "Paul, Apostle to the Gentiles."

- The Lincoln Memorial, on its north wall, bears the words of Lincoln's Second Inaugural Address, in which he uttered a number of religious sentiments and quoted from scripture, including the verse from the Old Testament: "The Judgments of the Lord are righteous and true, altogether."

Displaying three crosses on a city seal on city property is not constitutionally different from these practices.

Though some would expunge our history of all things religious, they cannot escape the fact that our nation's past is replete with public proclamations of our belief in God and His sovereignty. This type of public expression is a long-standing tradition that has enriched our nation and should not fall under Mr. Weinbaum's unforgiving view of the Establishment Clause.

B. <u>The City Seal Should be Upheld Because it is Part of a Long-Standing Tradition of Governmental Acknowledgement of the Role of Religion in Society and of God.</u>

The monument is also part of a long-standing tradition of governmental

acknowledgement of the role of religion in American life. When the First Amendment was drafted, officials of our new government participated in, or were witness to, numerous instances of such acknowledgements. These acknowledgements were made by various branches of our government, and engendered no litigation over their compatibility with the Establishment Clause.

The *Marsh* Court found this history relevant in holding that legislative prayer was a constitutional practice. That Court noted that just three days after the First Congress authorized appointment of paid chaplains to open Congressional sessions with prayer, the same Congress finalized the language of the First Amendment. *Id.* at 788. The Framers clearly saw no conflict between the proscriptions of the Establishment Clause and the daily observance of prayer at the very seat of government.

This was true for the executive as well. George Washington, in his first inaugural address, also acknowledged America's religious heritage:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government . . . .

George Washington, First Inaugural Address, *in* I *Messages and Papers of the Presidents* 44 (J. Richardson, ed. 1897).

In fact, it was the First Congress that urged President Washington

> to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging . . . the many . . . favors of Almighty God. . .

Id. at 56.

As the Supreme Court has noted, this resolution was passed by Congress on the *same day* that final agreement was reached on the language of the Bill of Rights, including the First Amendment. *Marsh*, 463 U.S. at 788, n. 9; *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984). President Washington did set aside November 26, 1789 as a day for people to "unite in most humbly offering [of their] prayers and supplications to the great Lord and Ruler of Nations . . . and [to] beseech Him to pardon [their] national and other transgressions. . . ." I *Messages and Papers* at 56.

Furthermore, many of these acknowledgements go beyond recognizing religion's role in American life. They directly acknowledge God Himself. The display of the Commandments is consistent with our centuries-old tradition of government publicly acknowledging God's sovereignty. Examples too numerous to mention could be cited, but the following list illustrates the wealth of this tradition:

- *Thomas Jefferson's Virginia Statute for Religious Freedom*, forerunner to the First Amendment, begins: "Whereas, Almighty God hath created the mind free"; and makes reference to "the Holy Author

of our religion," who is described as "Lord both of body and mind."[8]

- *The Declaration of Independence* acknowledges our "Creator" as the source of our rights, and openly claims a "firm reliance on the protection of Divine Providence." It also invokes "God" and the "Supreme Judge of the world."

- *Benjamin Franklin* admonished the delegates to the Constitutional Convention to conduct daily "prayers imploring the assistance of Heaven," lest the founders fare no better than "the builders of Babel."[9]

- *George Washington* frequently acknowledged God in his addresses, executive proclamations, and other speeches, stating on one occasion that it was "the *duty* of all nations to acknowledge the providence of Almighty God. . . ."[10]

- *Thomas Jefferson*, in his second inaugural address, invited the nation to join him in "supplications" to "that Being in whose hands we are."[11]

- *Abraham Lincoln* frequently made public expressions of religious belief. One example is found in a Proclamation he issued August 12, 1861, in which he called for a national day of "humiliation, prayer, and fasting for all the people of the nation . . . to the end that the united prayer of the nation may ascend to the Throne of Grace and bring down plentiful blessings upon our country."[12]

Thus, this nation enjoys a long tradition of public officials acknowledging

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[8] Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reproduced in* 5 *The Founder's Constitution* 77 (U. of Chicago Press 1987).

[9] *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* at 210 (W.W. Norton & Co. Pub. 1987).

[10] *Thanksgiving Proclamation*, October 3, 1789 *in* I *Messages and Papers of the Presidents* at 56 (J. Richardson, ed. 1897) (emphasis added). Six other examples, from Washington can be found at *id.* at 43, 47, 131, 160, 191, 213.

[11] Second Inaugural Address *in* I *Messages and Papers of the Presidents* 370 (J. Richardson, ed. 1897).

[12] Abraham Lincoln, A Presidential Proclamation *in* VII *Messages and Papers of the Presidents* 3238 (J. Richardson, ed. 1897).

God and his sovereignty in our nation's affairs that continues to this day.[13]

Therefore, whether the instant seal is characterized as acknowledging the role of religion in American life generally, or as acknowledging God, it is well within a long-standing tradition in *Marsh*. As noted above, the historical acceptability and longevity of a practice should mean that we, today, begin our analysis with the presumption that these practices, or those sufficiently similar, are constitutional.

A decision supporting Mr. Weinbaum's view would be in direct conflict with the intentions of the Framers of the First Amendment, and with practices and traditions of this nation which have endured for generations. Throughout America's history our government has openly declared its faith in, and reliance upon, God.

This Court should decide this case in light of that history. The city's display of the Las Cruces city seal will no more endanger the Establishment Clause than does the Biblical inscription on the Liberty Bell, or the national motto on our coins.

Thus, this Court should reject the notion that the First Amendment will not allow today what was permitted long ago by its very authors. Moreover, the burden of proving such a claim must be placed upon those who, by their "untutored

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[13] Furthermore, the above examples show that when the *Capitol Square* court ordered the New Testament attribution be removed from the Ohio motto display, 243 F.3d at 310, it need not have done so.

devotion to the concept of neutrality," *School District of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring), would make it their business to deny the citizens of Las Cruces this moral code of conduct and simple acknowledgement of the role of religion in our nation's heritage.

III. THE LAS CRUCES SEAL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BECAUSE THE CROSSES IN THE DESIGN FALL SHORT OF ESTABLISHING A RELIGION.

The Brief of the Appellant correctly noted that the Founding Fathers had two purposes in mind when writing the Establishment Clause: to prevent the establishment of a government religion; and to protect the minority from the tyranny of the majority. Brief of the Appellant at *8-9. It is also important to note that the Framers distinguished between four different concepts in the writing of the Establishment Clause in order to meet both of those goals: acknowledgement of religion (of which acknowledgement of God is a closely allied concept); accommodation of religion; encouragement of religion; and establishment of religion). Steven W. Fitschen, *Religion in the Public Schools After* Santa Fe Independent School District v. Doe*: Time for a New Strategy*, 9 Wm. & Mary Bill of Rts. J. 433, 446-49 (2001). Only the latter was forbidden. Since the Framers sought to achieve the two purposes noted above when drafting the Clause, drawing the line at establishment was the Framers' way of addressing both concerns simultaneously. *Id.* The court below weighed the opinions of the justices from

McCreary and *Van Orden*, but ultimately followed the *Lemon* factors with the modified endorsement test. However, the various opinions issued by the Court and by concurring and dissenting justices in *McCreary* and *Van Orden* warrant a closer examination to show that the Establishment Clause delineation permits state interaction with religion short of establishment. Your *Amicus* believes that the court below reached a favorable decision. But, if this Court were to find that the crosses in the city seal did not serve a secular purpose, the seal would still be constitutional because it falls short of an establishment of religion. (This comports with the argument made in Section II. A practice can fail under *Lemon*, but still pass muster under *Marsh* because the religious display is part of a larger tradition.)

To begin, your *Amicus* asserts that Justice Joseph Story's description of the purpose of the religion clauses should guide this case:

> Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Joseph Story, Commentaries on the Constitution of the United States § 1868 (Arthur E. Sutherland ed., Da Capo Press 1970) (1833).

Establishment of religion was rightly prohibited by the First Amendment, but acknowledgement, accommodation, and even encouragement of religion was

not prohibited. Quite the contrary, these practices are a "duty" of governments according to Story. *Id.* at § 1870.

Although these duties are not stated in the Constitution, they are not prohibited either. It is the people's prerogative to elect public officials who will act on these duties. Any law or any action by a state actor that acknowledges, accommodates, or encourages religion should pass constitutional muster. Only those that go beyond encouragement to establishment should be held unconstitutional. Establishment, of course, had a specific meaning under the First Amendment. Three variations of establishment were known to Story and his contemporaries:

> One, where a government affords aid to a particular religion, leaving all persons free to adopt any other; another, where it creates an ecclesiastical establishment for the propagation of the doctrines of the doctrines of a particular sect of that religion, leaving a like freedom to all others; and a third, where it creates such an establishment, and excludes all persons, not belonging to it, either wholly, or in part, from any participation in the public honours, trusts, emoluments, privileges, and immunities of the state.

Id. at § 1866. This is establishment. This is prohibited. Non-sectarian crosses on a city seal are not. No religion has been established by the simple display.

Two common attacks upon this position are that it is an antiquated idea, *see, e.g.*, *ACLU of Ohio v. Capitol Square Review and Advisory Board*, 210 F.3d 703, 725 n.17 (6th Cir. 2000) (relegating Story to a footnote), and

secondly, that Justice Story's view is one that stems from his position in the majority religion.

In answer to the first attack, courts may have backed away from explicitly stating that Christianity can be favored, they have never backed away from the idea that monotheism generally can be acknowledged, accommodated, and encouraged. For example, the Court in *Zorach v. Clauson*, 343 U.S. 306 (1952), recognized:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the state *encourages* religious instruction or cooperates with religious authorities by adjusting the schedule of public vents to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and *accommodates* the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

Id. at 313-14 (emphasis added). Further, in *Marsh*, the Court held that "[t]o invoke Divine guidance on a public body . . . is not . . . an 'establishment' of religion or a step toward establishment; [but] simply a tolerable *acknowledgement* of beliefs widely held among the people of this country." 463 U.S. at 792 (emphasis added). As the quotations from Justice Story and the Supreme Court demonstrate, the religion clauses were designed to allow acknowledgement, accommodation, and encouragement, but not establishment of Christianity.

Furthermore, the Court in *McCreary* and *Van Orden* re-affirmed that acknowledgment is acceptable because of history and of the intent of the Framers.

Chief Justice Rehnquist, writing for the plurality in *Van Orden*, noted that all three branches of the federal government have always acknowledged both God and religion, citing examples from both federal and state governments. 545 U.S at 687-88. Justices Stevens and Ginsburg believe that the evidence is "compelling" that the preferentialist view toward Christianity or monotheism likely predominated among the Founders. *Id.* at 726 (Stevens, J., dissenting). Further, Justice Scalia noted in *McCreary* that "[a]cknowledgement of the contribution that religion has made to our Nation's legal and governmental heritage partakes of a centuries-old tradition. Members of this Court have themselves often detailed the degree to which religious belief pervaded the National Government during the founding era." 545 U.S. at 905 (Scalia, J., dissenting).

As to the assertion that Justice Story's view emanates from his position as a member of the majority religion, nothing could be further from the truth. Joseph Story was a Unitarian, not an orthodox Christian. R. Kent Nemyer, *Supreme Court Justice Story: Statesman of the Old Republic* 180 (1985). However, he was intellectually honest enough to tell the truth about the meaning of the religion clauses. Additionally, as mentioned at the beginning of this argument, the drafters of the Bill of Rights drew an intentional line at establishment because they were concerned about the interaction between majorities and minorities in the body politic. *The Federalist Papers* reflect the concern about the tyranny of the majority

over the minority. For example, in *Federalist 51* we read, "[i]f a majority be united by common interest, the rights of the minority will be insecure." *The Federalist* No. 51, at 161 (James Madison) (Roy P. Fairfield ed., 2d ed. 1981). However, *The Federalist* was equally, if not more, concerned about the tyranny of the minority over the majority. For example, in *Federalist 22*, we read that the "fundamental maxim of republican government . . . requires that the sense of the majority should prevail." *The Federalist* No. 22, at 52 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981).

Thus, the court must never safeguard against the one tyranny at the expense of safeguarding against the other tyranny. Here, this Court should be wary of finding the crosses in the city seal unconstitutional because it would be essentially safeguarding a tyranny of the minority. As noted previously, if this Court should find that the crosses are an explicitly religious symbol and do not serve a secular purpose, the city seal should still pass constitutional muster because it does not cross the establishment line of the First Amendment. Since the Clause differentiates between accommodation, acknowledgement, encouragement, and establishment, this Court should recognize that the crosses are simply an acknowledgment of religion, and not an implication of one religion being favored over another. Just as the Founders and several Justices of the Supreme Court have recognized, America is founded upon a monotheistic tradition, so here, this Court

should find that the city seal is simply an acknowledgment of the monotheistic tradition.

CONCLUSION

For the foregoing reasons, this Court should dismiss the case for lack of subject matter jurisdiction. In the alternative, this Court should uphold the judgment of the district court.

Respectfully Submitted,
this 16th day of April 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced. This brief contains 6,733 words.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of National Legal Foundation in the case of *Weinbaum v. City of Las Cruces*, No. 06-2355 on all required parties by sending one electronic copy and by depositing two paper copies in the United States mail, first class postage, prepaid on April 16, 2007 addressed as follows:

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